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ABSTRACT

This short paper is part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It discusses educational voucher programs. It states that proponents of voucher programs, having scored a major victory in the U.S. Supreme Court with "Zelman v. Simmons-Harris" (2002), will continue to press their agenda at the state and local levels. (In "Zelman v. Simmons-Harris," the Court decided that vouchers programs, structured correctly, can overcome any objections based upon First Amendment religious-separation grounds.) The paper discusses some of the obstacles that voucher supporters might face. It specifically examines whether the legally permissible state clauses that are more restrictive than the federal Constitution's Establishment Clause will prove to be an impediment to the implementation of vouchers, and whether public opinion will support voucher programs. The paper discusses the "Blaine Amendments," language that bars allocation of public money to religious causes, and recaps current (at the time the paper was written) cases in Florida, Maine, Massachusetts, and Washington. The paper concludes with key findings of a national opinion poll on vouchers; most of the findings are unfavorable toward vouchers. (WFA)

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Flame On: The Fight Over Vouchers Will be a War Within the States

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November 2002

The next conflagrations involving vouchers for K-12 education will occur in the state courts and the statehouses. Literally from coast-to-coast – from Maine to Washington state – brush fires of discontent are being fanned by vouchers proponents who sense that their win at the United States Supreme Court must now be supplemented at the local level.

The outcome of these flare-ups will determine if vouchers are truly the next big idea and the most powerful alternative when public schools fail, or whether the movement will be relegated to a footnote in the education history of the United States.

One would be foolish to bet generously in either direction. Yet, trend-wise, voucher proponents have had a tough time convincing state court judges to read broadly the language found in state Constitutions. Voucher supporters have had an even tougher time convincing the masses that a voucher entitling a student to walk from their public school haven and take public taxpayer dollars down the street to a neighborhood private or parochial school, is even worthwhile.

As far as vouchers are concerned, the period that we are in now is both dynamic and uncertain. Yet, since the June U.S. Supreme Court decided in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) that voucher programs, structured correctly, can overcome any objections based upon First Amendment religious separation grounds, the voucher cheering squads have been revitalized.

What has yet to be resolved is two-fold. First, whether the legally permissible state clauses that are more restrictive than the federal Constitution's Establishment Clause will indeed prove to be an impediment to the implementation of vouchers. Second, is whether public opinion will support the kind of large-scale exodus from public schools that the most enthusiastic promoters seek. This paper will examine each question in turn.

There are basically two approaches taken in state Constitutions that might puncture the tire of the voucher juggernaut. The first are the so-called "Blaine Amendments" – variations of which can be found in 36 states (and Puerto Rico) and which explicitly prohibit grants or appropriations to religious institutions or organizations. The language, originally proposed by U.S. Congressman James G. Blaine of Maine in 1875, failed despite an effort to make it part of the nation's Constitution. In response, states started adopting what were casually referred to as "little Blaine Amendments" to their state Constitutions, effectively barring public money to religious causes.

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Critics of Blaine Amendments allege that the swift passage of these little Blaines was fueled by anti-Catholic sentiment and that the real motivation behind these state Constitutional amendments was to keep the money out of the hands of Catholic individuals who objected to the protestant-oriented public schools and were looking to fund their own schools.

The second method is a little more indirect, but provides the same sort of hurdle as the Blaine Amendments. In this rendition, the state Constitution provision states that no individual shall be compelled to support any ministry without her or his consent. This language hails from the colonial period and is meant to address the then-common practice of government collecting money for the support of churches. According to the Institute for Justice, only three states (Louisiana, Maine and North Carolina) contain neither the Blaine Amendment nor the compelled support language; 18 of the states have both.[1]

Here is the current status of some active cases:

Florida

Voucher foes are savoring a victory at the state circuit court level in Florida in *Holmes v. Bush* and *FEA v. State Board of Education*. The court in the consolidated cases said the religious clause of the Florida Constitution is quite clear, and that it allows no room for public money to be diverted to vouchers. The program, which involves placing letter grades on public schools and allowing students to exit from buildings that fail for more than two years in a row, is continuing while an appeal is being pursued.

Maine

The Institute for Justice, a Washington, D.C.-based think tank that advocates for vouchers, is the force behind *Anderson v. Town of Durham*, a case that challenges Maine's 1981 state law barring religious schools from participating in a system that lets public high school students attend the private or public school of their choice. The idea is that small towns pay the tuition of students to go elsewhere, rather than pay for the maintenance and upkeep of the schools as part of the district. The Institute represents six families from three small towns in Maine—Durham, Minot and Raymond – in the first of what it calls its nationwide school choice counteroffensive after the Supreme Court decision in *Zelman*.

Washington State

In *Harrison v. Gregoire*, the Institute for Justice on September 24, 2002, took a new tack in its litigation efforts. The group is challenging a state policy that forbids public school students from teaching in religious schools. That means that teacher certification candidates attending public universities must conduct their student teaching at public schools rather than Catholic, Seventh Day Adventist or other religiously affiliated learning institutions. The Institute alleges that the state has interpreted its Blaine Amendment too broadly.

Massachusetts

The Becket Fund has gotten creative, filing a federal lawsuit in 1998 (*Boyette v. Galvin*, No. 98-CV-10377-GAO) to overturn a section of the Massachusetts Constitution that "no grant,

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[1] Richard Komer and Clint Bolick, *School Choice: The Next Step: The State Constitutional Challenge* (2002) at *http://www.ij.org/editorial/choice_next.shtml*.

appropriation or use of public money or property or loan of credit" shall be made in support of religious institutions. That language dates from 1854 – long before Blaine ever entered politics.

Even in *Zelman*, the U.S. Supreme Court left open the possibility that states would erect their own blockades to vouchers, with Justice Thomas in a concurring opinion writing that states should not let the Establishment Clause prevent them from passing laws that "include or touch on religious matters." Thus the interpretation of state clauses in state Constitutions and the permissibility of statutes are ultimately decided by each state's highest court.

On to the Statehouses

One ripple effect of the U.S. Supreme Court decision is that it puts the voucher debate back into the political arena. Having dispensed with the Establishment Clause objection, many state legislatures will now consider passing laws that permit tax money to be used for private, religious schools. Naturally, however, a political consensus will have to gel around the idea before it can get passed and signed into law. And, in recent times that groundswell has been hard to come by and discouraged both in the state legislative chambers and at the ballot box in states with referenda or initiatives. The primary question is this: will vouchers improve student achievement? A skeptical public does not necessarily believe that one can improve education by steering a certain percentage of students away from it. Nor do they believe that the primary motivation behind vouchers is to "save" poor and oftentimes racial and ethnic minority children.

U.S. Supreme Court Justice John Paul Stevens intimated in his dissent that the fallout from the *Zelman* decision would be an increase in divisiveness and acrimony among the public. "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy," Stevens wrote.

Public support for vouchers has been at best, ambivalent and at worst, hostile. Voters have rejected every voucher proposal put before them in the last 30 years. In 2000, 71 percent of California voters rejected a voucher plan, while 69 percent of Michigan voters did the same. A California poll by CNN.com found that people of all races, political parties and income levels voted against vouchers.

One measure of how important this issue has grown, is the fact that the National School Boards Association has developed a "Voucher Strategy Center" which focuses on developments, information and advocacy against vouchers wherever it might arise.[2]

Yet another aspect of the voucher battle is the one over accountability. The reauthorized Elementary Secondary Education Act (dubbed No Child Left Behind) was passed in early 2002 and imposes a series of strict mandates on public schools. There are testing requirements, community reporting requirements and exit provisions that are all designed to hold school boards and educators accountable for the academic performance of students.

Beyond test scores, the accountability can include such things as curriculum, teacher certification, student discipline, enrollment of minority or special education students and onward.

A Milwaukee school board member makes the point about governance powerfully in talking about the subject. The Wisconsin city had a voucher program of its own with which to deal.

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[2] *See* attached NSBA/Zogby International Poll on Vouchers.

"For policymakers and taxpayers, the overarching problem with the Milwaukee voucher program is the lack of useful data on participating students and schools. School board members are responsible for the thoughtful and effective spending of the tax dollars entrusted to us, but who is overseeing the public's investment in voucher schools? No one." *Jennifer Morales, Milwaukee school board member.*

It seems clear that the U.S. Supreme Court was leading up to the conclusion that vouchers are permissible. Two years ago in *Mitchell v. Helms*, 530 U.S. 793 (2000) (a decision that dealt with public money for technology in religious schools) the opinion by Justice Clarence Thomas seemed to outline a blueprint for a public-private relationship that would pass muster. Using that platform in *Zelman*, Chief Justice William Rehnquist indicated that choice programs that are focused on low-income students in low-performing schools in particular, are just providing one more alternative for delivery of educational services.

By tradition, private schools have escaped the accountability scrutiny by virtue of their private status. Yet, the question that must be asked is what is the impact of public money reaching private school coffers via a voucher? If religious schools accept the taxpayer money, should they similarly be held accountable and forced to disclose key data about student achievement?

Another question to be asked is whether students who arrive with tax-funded vouchers are able to opt out of the religious worship and other religious activities that are otherwise mandatory.

A final irony of the *Zelman* decision was highlighted in an article in the publication *Education Week*. It noted that the general thrust of the decision is to make it more possible for government to provide aid to religious activities. But, that ability, coupled with the Court's free speech doctrine that almost guarantees equal access to any group with religious convictions, may "make it very difficult to exclude even the most obnoxious and controversial private religious schools from participating in voucher plans."[3]

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[3] Tyll van Geel and William Lowe Boyd, *Vouchers and the Entanglement of Church and State*, Education Week (Sept. 4, 2002), http://www.edweek.org/ew/ew_printstory.cfm?slug=01boyd.h22.

KEY FINDINGS OF MAJOR NATIONAL OPINION POLL BY NSBA/ZOGBY INTERNATIONAL

- **Americans say public money demands public oversight. Vouchers eliminate oversight.** Up to 90 percent of Americans expect private schools that accept vouchers to meet many of the same accountability standards as public schools. But voucher programs fail to meet these expectations. These include:

  -- 90 percent of all adults and 86 percent of African-Americans expect a private school "to publicly disclose how it spends tax dollars."

  -- 89 percent of all adults and 93 percent of African-Americans expect a private school "to give their students the same state tests as public school students, and report those test results."

  -- 89 percent of all adults and 89 percent of African-Americans expect private school students "to meet the same academic standards" as public school students.

  -- 80 percent of all adults and 87 percent of African-Americans expect private schools "to admit all students, regardless of academic or physical abilities."

- **Americans oppose draining tax dollars from public schools. Vouchers do this precisely.** Nearly 40 percent of Americans who initially said they *supported* vouchers, change their minds if it means the public schools lose tax dollars. Among African-Americans who initially supported vouchers, 57 percent withdraw their support if public schools lose money.

- **Americans rank vouchers near the bottom in ways to improve public schools.** A mere 12 percent of all adults and just 5 percent of African-Americans said vouchers are the way to most improve public schools. Americans prefer their tax dollars be invested to help reduce class sizes and strengthen teacher quality. For example, African-Americans are 7 times as likely to choose smaller class sizes over vouchers as the way to improve public schools.

- **Among African-Americans, 57 percent oppose vouchers while only 41 percent favor them.** And, 41 percent said they "strongly oppose" vouchers, more than double the 19 percent who "strongly favored" them.

- **Americans oppose vouchers for students already in private schools.** Sixty-one (61) percent of all adults and 74 percent of African-Americans oppose vouchers for students who already attend private schools. In Cleveland, 1 in 3 of the current voucher students attended private schools before receiving a tax-funded voucher.

Access the entire poll at NSBA's Voucher Strategy Center web site: nsba.org/novouchers.
Poll conducted in 2001 by Zogby International, interviewing 1,211 adults.
Margin of error for adults is +/- 3 percent; for African-Americans it is +/- 5.7 percent.

Visit www.nsba.org/novouchers -- NSBA's Voucher Strategy Center
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